The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FREDERICK M. ABBAS and GREG ALLEN ABBAS

Appeal No. 2005-0944 Application No. 09/941,377 MAILED

APR 2 7 2005

ON BRIEF

Before OWENS, WALTZ, and DELMENDO, <u>Administrative Patent Judges</u>.

DELMENDO, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 (2004) from the examiner's final rejection of claims 1 through 14 and 16 through 20 in the above-identified application.

Claims 15 and 21 through 25, the only other pending claims, appear to have been allowed. 1

 $^{^{1}}$ Claims 21-25 were first submitted for examination as part of a 37 CFR § 1.116 (2004) (effective Feb. 5, 2001) amendment filed on Jun. 7, 2004. It appears that the examiner has entered

Appeal No. 2005-0944 Application No. 09/941,377

The subject matter on appeal relates to a method for distributing a scented chemical composition for hunting animals (claims 1 and 2) and to an apparatus for distributing a scented chemical composition for hunting animals (claims 3-14 and 16-20). Further details of this appealed subject matter are recited in representative claims 1 through 3 and 9 reproduced below:

1. A method for distributing a scented chemical composition for hunting animals, the method comprising:

providing a pressurized dispenser for pressure based dispensing of a foam string from a distance away from a target, the distance being sufficient to avoid an ambient environment being contaminated by human scent, the foam string including the scented chemical composition to attract animals or mask human scent or both; and

discharging the foam string toward the target.

2. A method for a hunter to hunt animals by dispensing a chemical composition that emits a scent from a dispenser, the method comprising;

configuring a can to dispense a liquid-gas foam string of encapsulated plastic resin, the string including the chemical composition;

providing the chemical composition so as to emit the scent for a selected period of time after being dispensed, wherein the scent attracts animals or masks human scent; and

dispensing the string from the can toward a target, the string being dispensed far enough away from the can that the hunter does not substantially

this amendment. (Examiner's answer mailed on Jul. 20, 2004 at 2, "Grouping of Claims.")

contaminate an area around the target.

- 3. An apparatus for distributing a scented chemical composition for hunting animals, the apparatus comprising:
- a pressurized dispenser for pressure based dispensing; and
- a foam string dispensed by the dispenser, the foam string including the scented chemical composition for hunting.
- 9. The apparatus of claim 3, wherein the chemical composition comprises a chemical composition that masks human scent.

The examiner relies on the following prior art references as evidence of unpatentability:

Cox et al. (Cox)	3,705,669	Dec.	12,	1972
Easley	4,771,563	Sep.	20,	1988
Konietzki	4,788,787	Dec.	6,	1988

appeal stand rejected under 35 U.S.C. § 103(a) as unpatentable over Cox in view of Konietzki. (Answer at 3-4.)

Correspondingly, dependent claims 7 through 10 on appeal stand rejected under 35 U.S.C. § 103(a) as unpatentable over Cox in view of Konietzki, as applied to claim 1, and further in view of Easley. (Id. at 4.)

Claims 1 through 6, 11 through 14, and 16 through 20 on

Appeal No. 2005-0944 Application No. 09/941,377

We reverse as to claims 1 and 2 but affirm as to claims 3 through 14 and 16 through $20.^2$

Cox, the principal prior art reference, describes a pressurized dispensing container containing a composition comprising a resin for forming a cohesive body of plastic foam, a surfactant for providing a surface of controlled tackiness on the foam, and a propellant in which the resin and the surfactant are soluble for propelling the composition from the container and for subsequent expansion to form the foam. (Column 1, lines 19-27.) Cox further teaches that "[a]s the composition is expelled, it remains in the form of a thin string..." (Column 2, lines 48-53.) Cox also teaches that "if desired perfumes [3]

With respect to the rejection based on Cox and Konietzki, the appellants state that the claims should be considered separately in two groups as follows: (I) claims 1, 2, and 11; and (II) claims 3-6, 12-14, and 16-20. (Appeal brief filed on Jun. 7, 2004 at 4.) For reasons discussed more fully below, we will consider claims 1, 2, and 11 individually. As to Group II, we select claim 3 as representative and confine our discussion to this representative claim. 37 CFR § 1.192(c)(7)(2003) (effective Apr. 21, 1995). With respect to the rejection based on Cox, Konietzki, and Easley, the appellants state that claims 7-10 stand or fall together. (Appeal brief at 4.) We select claim 9 as representative and confine our discussion to this representative claim.

With respect to the definition of the term "perfume," Merriam-Webster's Collegiate Dictionary 863 (10th ed., 1996), copy attached, includes the following: "a substance that emits a pleasant odor; esp: a fluid preparation of natural essences (as

or other odors may be incorporated in the composition." Column 7, lines 12-14.) According to Cox, the container may be used as a toy or play article. (Column 1, lines 7-15.) Nothing in Cox suggests the use of the disclosed container for hunting animals.

Konietzki, the other reference on which the examiner relies to reject appealed claims 1 and 2, discloses a scent propagation device having a leak-proof container and a line contained in a housing that is saturated with liquid concentrate of a scent indigenous to the environment of the game that is hunted.

(Column 1, lines 51-55.) According to Konietzki, the line may be drawn out from within the housing as a means of dispersing the scent. (Column 1, lines 55-57.)

The examiner states that "Cox et al. do not disclose <u>a</u>

<u>scent for a hunter to lure animals"</u> but that one of ordinary

skill in the art would have been led to combine the teachings of

Cox and Konietzki to arrive at the subject matter of appealed

claims 1 and 2. (Answer at 3-4.) We disagree.

As a preliminary matter, we note that appealed claim 1 recites "scented chemical composition to attract animals or mask human scent." (Emphasis added.) Thus, contrary to the

from plants or animals) or synthetics and a fixative used for scenting."

examiner's finding, Cox discloses the use of a "scented chemical composition" in the form of perfumes. Similarly, appealed claim 2 recites "scented chemical composition for hunting." The subject specification informs one skilled in the relevant art that the term "chemical composition" includes "a composition that masks human scent." (Specification at 3.) Accordingly, one skilled in the relevant art would understand that the recitation "scented chemical composition for hunting" encompasses Cox's perfumes, which would serve to mask human scent.

Nevertheless, we find no motivation, suggestion, or teaching in either Cox or Konietzki to make the examiner's proposed combination. While Cox suggests a method for applying the foam on "inert surfaces such as windows, walls, and the like" for play purposes (column 2, lines 63-68), such a purpose has no relation to hunting. Nothing in the applied prior art references would have led one of ordinary skill in the art to modify Cox's play method into a method for distributing [in a hunting ground] a scented chemical composition. In re

Dembiczak, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999) ("T]he best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous

application of the requirement for a showing of the teaching or motivation to combine prior art references.")

For these reasons, we cannot uphold the examiner's 35 U.S.C. § 103(a) rejection of appealed claims 1 and 2 as unpatentable over Cox in view of Konietzki.

The examiner's rejection of appealed claims 3, which is directed to an apparatus, is another matter. As we discussed above, Cox discloses an apparatus including a pressurized container capable of dispensing a foam composition in the form of a string, which may include perfumes (i.e., a scented chemical composition). While Cox does not disclose the use of the prior art apparatus for hunting, this does not defeat the examiner's rejection because the prior art apparatus and the claimed apparatus are structurally identical. Cf. In re Bigio, 381 F.3d 1320, 1326, 72 USPQ2d 1209, 1212 (Fed. Cir. 2004); In re Schreiber, 128 F.3d 1473, 1477, 44 USPQ2d 1429, 1431 (Fed. Cir. 1997); In re Sinex, 309 F.2d 488, 492, 135 USPQ 302, 305 (CCPA 1962); In re Wolfe, 251 F.2d 854, 855, 116 USPQ 443, 444 (CCPA 1958); In re Hack, 245 F.2d 246, 248, 114 USPQ 161, 162 (CCPA 1957).

It is our judgment, therefore, that Cox describes, either expressly or inherently, each and every limitation of appealed claim 3.

With respect to appealed claim 11, Cox teaches that the foam string may be propelled 6 inches or more from the nozzle of the container, which can provide more than 0.5 mile of string.

(Column 2, lines 25-39.) Thus, it would reasonably appear that Cox's apparatus would have the same characteristic recited in appealed claim 11.

With respect to appealed claim 9, we have already pointed out that Cox teaches the use of perfumes. Thus, the limitation recited in appealed claim 9 is of no help to the appellants.⁴

We have considered all of the arguments set forth in the appeal brief and reply brief filed on Sep. 23, 2004 but do not find any of them germane to the apparatus claims.

In summary, we reverse the examiner's rejection under 35 U.S.C. § 103(a) of appealed claims 1 and 2 as unpatentable over Cox in view of Konietzki. We affirm, however, the rejections under 35 U.S.C. § 103(a) of: (i) appealed claims 3 through 6, 11 through 14, and 16 through 20 as unpatentable over Cox in view

⁴ We need not discuss the teachings of Easley because they are unnecessary to support the rejection of appealed claim 9.

of Konietzki; and (ii) appealed claims 7 through 10 as unpatentable over Cox in view of Konietzki and further in view of Easley.

Accordingly, the decision of the examiner is affirmed in part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR $\S 1.136(a)$.

AFFIRMED IN PART

Terry J. Owens)
Administrative Patent Judge)
Thomas A. Waltz)
Administrative Patent Judge)

BOARD OF PATENT

APPEALS AND

INTERFERENCES

Romulo H. Delmendo

Administrative Patent Judge

RHD/kis

Appeal No. 2005-0944 Application No. 09/941,377

BROOKS & KUSHMAN P.C. 1000 TOWN CENTER 22nd FLOOR SOUTHFIELD, MI 48075



Merriam-Websters & Collegiate Dictiona

Merriam-Webster, Incorporated Springfield, Massachusetts, U.S.A.



A GENUINE MERRIAM-WEBSTER

The name Webster alone is no guarantee of excellence. It is used by a number of publishers and may serve mainly to mislead an unwary buyer.

Merriam-Webster™ is the name you should look for when you consider the purchase of dictionaries or other fine reference books. It carries the reputation of a company that has been publishing since 1831 and is your assurance of quality and authority.

Copyright © 1996 by Merriam-Webster, Incorporated

Philippines Copyright 1996 by Merriam-Webster, Incorporated

Library of Congress Cataloging in Publication Data Main entry under title:

Merriam-Webster's collegiate dictionary. — 10th ed.

cm. p.

Includes index.

ISBN 0-87779-708-0 (unindexed : alk. paper). — ISBN 0-87779-709-9 (indexed : alk. paper). — ISBN 0-87779-710-2 (deluxe : alk. paper). — ISBN 0-87779-707-2 (laminated cover).

1. English language-Dictionaries. I. Merriam-Webster, Inc.

PE1628.M36

1996

423-dc20

95-36076

CIP

Merriam-Webster's Collegiate® Dictionary, Tenth Edition principal copyright 1993

COLLEGIATE is a registered trademark of Merriam-Webster, Incorporated

All rights reserved. No part of this book covered by the copyrights hereon may be reproduced or copied in any form or by any means—graphic, electronic, or mechanical, including photocopying, taping, or information storage and retrieval systems—without written permission of the publisher.

Made in the United States of America

16RMcN96

lay (a ~ mandamus) | dusion based, on abrell mand (a ~ call) | d | gant, self-assurano (a) | w ~ Shak.) b'llosing control (a ~ tone) (c du prul pe-rempto) | day pe-rempto)

llenge (as of a juror) mile at-ed; -nat-ing (L. 12): to live over-from pare-in-

/s. happiness) e [() e an act of ~ [ooishness] inting a verb form or yeth at the time of speaking of e b. Contented and when the inverted and when inverted and when gemented or diminished a (a ~ insect) b. hashing the state of the state d (a ~ insect) b : have r (a ~ flower) — perdet

not lacking or faulty in and the excellence of end uently as an unattainable a HOLE suggests a completent or regained (felt like a stall lies perfection deriving from a thing (the entire Beethous ction of a thing in its nate rm intact).

1: to bring to final form

r-fect-er n tense of a language; also

ela perfecta perfect quindi he first and second place h grin which a layer of adhele per-fect-bound \por-lhill

ime in which a pitcher allow o reach first base |k-\| adj (1635) : capable | |bill-i-ty \por-lek-to-bi-let

ccioun, fr. OF perfection, till-1: the quality or state of be-or defect: FLAWLESSNEED cing saintly 2 a : an exam-unsurpassable

eing saintly 2 a a an easily unsurpassable degree of acting of perfecting 346). 1: a : the doctrine the tutes a person's highest position of freedom from sin is attained anything short of perfection it-)nist\'n' or adj — perfection

tter 2: expressing action mpletion, conclusion, or realized by adv per-fective action in a per-fective dj (1596) 1 archaic a : 100

iso por-IK-1, in a perfect manner 2: 104 g ~ happy until now) as 6 or 28) the sum of whose itself is equal to itself perfect, fr. L' perfectus] (1896) rs at each end

apers at each end र क्षाप्तिको प्रधानका स्टब्स्

s 9 or 36) whose square roof

NL perfervidus, fr. L per thoused by overwrought or exagens is the index of the control of the c

): of relating to or characterier fid-lous-ly; adv. — per fid-

Hely \pariside\ n. pl -dies [L perfidia, fr perfidia faithless; fr. detrimental to + fides faith - more at PER FAITH] (1592). It the sailly or state of being faithless or disloyal: TREACHERY 2: an act or minimal to the sailly sail that the sail that the

instance of being faithless or disloyal: TREACHERY and an array instance of disloyalty the lister \(\phi\)-fo-\(\frac{1}{2}\)-f who through or into by or as if by making a hole wit to penetrate a per-forate '\por-fo-rate'\po

intrough or into by or as it by making a noise "wisto penetrate a shock "berifare to "per-for-ate" ("per-for-ate") per-for-ate ("per-for-ate") per-for-ate ("per-for-ate") per-for-ate ("per-for-ate (PREFORM: EXECUTE. DISCHARGE: ACCOMPLISH: ACHIEVE: EFFECT. WITH, mean ito carry out on into effect. FERFORM implies action that large stablished patterns or procedures or fulfills agreed-upon aquirements and often connotes special skill (performed gymnastics). ARCUTE stresses the carrying out of what exists in plan or incinient (provided the intended and not only of special skill (performed gymnastics). ORCUTE stresses the completion of a process rather than the means the successful completion of a process rather than the means the successful completion of a process rather than the means the successful completion of a process rather than the means the successful completion of a process rather than the means that the successful completion of a process rather than the means the successful completion of a process rather than the means the successful completion of a process rather than the means that the successful completion of a process rather than the means the successful completion of a process rather than the means the successful completion of a process rather than the means that the successful completion of a process rather than the means the successful completion of a process rather than the means that the successful completion of a process rather than the means that the successful completion of a process rather than the means that the successful completion of a process rather than the means the successful completion of the successful compl

| Converse | Converse

PAROLE: also: the ability to speak a certain language -

in the with an odor perfumed; perfumed; perfument (1930): to include with an odor pumeer. \po(n)-fyü-mər, per-\n (ca. 1580): one that makes or the perfumes. \po(n)-fyü-mər, per-\n (ca. 1580): one that makes or the perfumes. \po(n)-fyü-mər, per-\n (ca. 1580): one that makes or the perfumes. \po(n)-fyü-mər, per-\n (ca. 1580): one that makes or the perfumes. \po(n)-fyü-mər, per-\n (fy)-mər, per-\n (fy)-mər, per-\n (fy)-mər, per-\n (fy)-mər, per-\n (fy)-mər, per-\n (fy)-mər, per-\n (fy)-per-\n (fy

scended from fallen angels and excluded from paradisc until penance is accomplished 2: a beautiful and graceful girl peri-prefix [L, fr. Gk. around, in excess, fr. peri akin to Gk peran to pass through — more at FARE] 1: all around a bout (periscope) 2: near (perhelion) 3: enclosing: surrounding permeurum) peri-ainth (per-e-ant) in [NL perianthium, fr. peri- + Gk anthos flower — more at ANTHOLOGY] (1828): the floral structure comprised of the calva and corolla esp. when the two whorls are fused — see FLOWER illustration. FLOWER illustration

FLOWER illustration

periapt \periapte. Apt\ n [MF or Gk; MF periapte, fr. Gk periapton, fr. periapte in to fasten around (oneself), fr. peri. + haptein to fasten]

(1584): AMULET

peri-caf-di-al \per-2-kar-de-al\ adj (1654): of, relating to, or, affecting the pericardium; also: situated around the heart

peri-car-di-fits \-kar-di-tas\ n [NL] (ca. 1799): inflammation of the

pericar-di-tis \-kar-di-tas\ n [NL](ca. 1737) inhammation repericardium \-kar-de-tas\ n [NL](ca. 1737) inhammation repericardium \-kar-de-am\ n pl -dia \-de-\ [ME, fr. ML, fr. Gk perikardion, neut of perikardios around the heart, fr. peri-+ kardia heart — more at HEART] (15c) 1: the conical sac of serous membrane that encloses the heart and the roots of the great blood vessels of vertebrates 2: a cavity or space that contains the heart of an invertebrate and in arthropods is a part of the hemocoel peri-carp \(\text{Peri} \) -karpion \(\text{carp} \) in [NL \(\text{pericarpium} \), fr. \(\text{Gk} \(\text{perikarpion} \) pod, fr. \(\text{peri} \) -karpion \(\text{carpi} \) in [NL \(\text{pericarpium} \), fr. \(\text{Gk} \(\text{perikarpion} \) pod, fr. \(\text{peri} \) -karpion \(\text{carpion} \) -exp \(\text{Visit} \) -exp \(\text{carpion} \) -exp \(\text{Visit} \) -exp \(\text{carpion} \) -exp \(\text{Visit} \) -exp \(\text{Chondros grain} \), cartilage \(\text{(1741)} \): the membrane of fibrous connective tissue that invests cartilage except at joints \(-\text{peri-chondral} \) \(\text{Arisin} \) -exp \(\text{chondral} \) \(\text{Arisin} \) \(\text{chondral} \) \

and stems that typically consists: of phellem, phellogen, and phelloderm has a proper derived and phellogen and ph

(fire put the city in ~) 2: something that imperils :-RISK (lessen-the ~s of the streets)

**peril vi iled also -illed; -ill-ing also -il-ling: (1567) : to expose to

danger pe-ril-la \po-ri-la\ n [NL] (1900): any of a genus (Perilla) of Asian mints that have a bilabiate fruiting calyx and rugose nutlets perilla oil n (1917): a light yellow drying oil that is obtained from

eds of perillas per-il-ous \'per-o-los\ adj (14c): full of or involving peril: HAZARDOUS

per-il-ous \ \per-\text{oper-als}\ adj (14c): full of or involving peril: HAZARDOUS syn see DANGEROUS — per-il-ous-ly adv — per-il-ous-ness n peri-lune \ \per-\text{oper-lune}\ \per-\text{oper-lune}\ \ \per-\text{oper-lune}\ \ \per-\text{oper-lune}\ \per-\text{oper-lune}\ \ \per-\text{oper-lune}\ \ \per-\text{oper-lune}\ \per-\text{oper-lune}\ \ \per-\text{oper-lune}\ \per-\text{oper-lune}\ \per-\text{oper-lune}\ \per-\text{oper-lune}\ \per-\text{oper-lune}\ \per-\text{oper-lune}\ \per-\text

used in pl.
peri-my-si-um \,per->-mi-zhē-əm, -zē-\ n, pl -sia \-zhē-ə, -zē-\ [NL, -irreg-fr. peri-+-Gk. mys mouse, muscle — more at MOUSE] (ca. 1842)
the connective-tissue sheath that surrounds a muscle and forms sheaths for the bundles of muscle fibers

\a\ abut \a\ kitten, F table \ar\ further \a\ ash \a\ ace \a\ mop, mar \au\ out \ch\ chin \e\ bet 1 \e\ easy \g\ go \hi\ hit \hi\ ice \i\ job \n\sing \\do\ law \\doi\ boy \th\ thin \th\ the \\\u00fc\-loot \\u00fc\ loot \y\ yet \zh\ vision \a, k, ", ce, ce, ue, ue, v, \see Guide to Pronunciation